In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 873

CHINA LIQUOR DISTRIBUTING CO., ET AL., HUISE IMPORT CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Customs Court is reported at 48 Cust. Ct. 217, rehearing denied, 49 Cust. Ct. 208. The opinion of the United States Court of Customs and Patent Appeals (Pet. App. 1–11) is not yet reported.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on May 28, 1964 (Pet. App. 11–12). A petition for rehearing was denied on November 5, 1964 (Pet. App. 12–13). The petition for a writ of certiorari was filed on February 3, 1965. The

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jurisdiction of this Court is invoked under 28 U.S.C. 1256.

QUESTION PRESENTED

Whether the General Agreement on Tariffs and Trade (GATT) prohibits an increase in the internal revenue tax on distilled spirits from being applied to imported spirits of less than 100 proof on the basis of volume.

STATUTES INVOLVED

Section 2800(a)(1) of the Internal Revenue Code of 1939, as amended, provides:

> There shall be levied and collected on all distilled spirits in bond or produced in or imported into the United States an internal revenue tax at the rate of $10.50 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the distiller or importer when withdrawn from bond. * * *

Article II of the General Agreement on Tariffs and Trade, 61 Stat. (Part V) A14, provides in pertinent part:

> 1. * * * (b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided for therein. Such products shall also be exempt from all

other duties or charges of any kind imposed on or in connection with importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

* * * * *

2. Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product

(a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 1 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part;

* * * * *

Article III of the General Agreement on Tariffs and Trade, 61 Stat. (Part V) A18, as amended, 62 Stat. (Part III) 3679, provides in pertinent part:

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or

> other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

STATEMENT

Petitioners imported whiskey, cordials, rum and other distilled spirits which were bottled "below proof," *i.e.*, at less than 100 proof (100 proof spirits contain 50% alcohol by volume). The Collector of Customs assessed an internal revenue tax of $10.50 per wine gallon (the standard United States gallon) in accordance with Section 2800(a)(1) of the Internal Revenue Code of 1939, as amended, 56 Stat. 970–971 (now Section 5001(a) of the Internal Revenue Code of 1954, as amended) which provides for such a tax "*on each* proof gallon or *wine gallon when below proof*" (emphasis added). Petitioners filed a protest in the Customs Court addressed to that part of the assessed tax resulting from the enactment of Section 451 of the Internal Revenue Act of 1951 (65 Stat. 524), which had increased the tax from $9.00 to $10.50. Petitioners claimed that under the General Agreement on Tariffs and Trade (GATT) the 1951 addition to the tax may not be assessed on imported spirits which are below proof on the basis of their volume, but must be assessed in proportion to alcoholic content.

The Customs Court overruled the protest, holding that "the principle laid down in the *Bercut* case [*Bercut-Vandervoort & Co.* v. *United States*, 46

C.C.P.A. 28, certiorari denied, 359 U.S. 953] is controlling here" (48 Cust. Ct. at 220). The Court of Customs and Patent Appeals affirmed on the same basis (Pet. App. 10).

1. THE INTERNAL REVENUE CODE AND THE GENERAL AGREEMENT ON TARIFFS AND TRADE

Section 2800(a)(1) of the Internal Revenue Code of 1939, as amended, imposes a flat tax of $10.50 per gallon upon spirits of 100 proof or less, with a proportionate addition for spirits with proof above 100. Thus one gallon of either 50 or 100 proof spirits is subject to the same tax of $10.50, while one gallon of 150 proof spirits is subject to a tax of $15.75. Payment of the tax is due when the spirits are produced or, in the case of imported spirits, upon importation. If the spirits are placed in a bonded warehouse immediately upon production or importation, however, the tax may be postponed until the spirits are withdrawn from bond.

This plan of taxation, involving a flat rate for spirits of 100 proof or less, which are taxed per "*wine* gallon," and a graduated rate for overproof spirits, which are taxed per "*proof* gallon," has been a part of internal liquor taxation for almost a century. See Act of July 20, 1868, 15 Stat. 125. The time for payment of the tax also long antedates the General Agreement on Tariffs and Trade. See Section 600(a) of the Revenue Act of 1918, 40 Stat. 1057, 1105. Only the amount of the tax has been varied by intervening tax acts.

Article II, paragraph 1(b) of the General Agreement on Tariffs and Trade, *supra*, pp. 2–3, which be-

came effective in 1948, provides that products imported into the United States from other contracting nations shall be "exempt from all other duties or charges of any kind imposed on or in connection with importation in excess of those imposed on the date of this Agreement * * *." Article II, paragraph 2, however, provides as an exception that "Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product * * * a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 1 of Article III in respect of the like domestic product * * *." Article III, paragraph 2 provides that imports into the United States from other contracting nations "shall not be subject, directly or indirectly, to internal taxes * * * in excess of those applied, directly or indirectly, to like domestic products." Finally, Article III, paragraph 1, provides that "internal taxes * * * should not be applied to imported or domestic products so as to afford protection to domestic production."

2. *THE* BERCUT *DECISION*

In *Bercut-Vandervoort & Co.* v. *United States, supra,* the Court of Customs and Patent Appeals held that the tax increase imposed by Section 451 of the Internal Revenue Act of 1951 did not conflict with either Article III, paragraph 1 or Article III, paragraph 2 of GATT. The basis for the Court's holding was the fact that the division of all distilled spirits, whether imported or domestic, into two categories—100 proof or over, to be taxed per proof gallon, and below 100 proof, to be taxed per wine gallon—has

been in effect since 1868. "Each classification creates a separate and distinct commodity, and the tax is levied on each one" (46 C.C.P.A. at 32). In this connection, the court pointed out (*id.* at 33):

> The domestic producer controls the composition of his products in the same fashion that the importer can control the composition of his product when he imports it. He can import proof or over proof spirits and have the commodity taxed accordingly. The provisions of the act are applied uniformly to the merchandise of the domestic producer and importer alike.

This Court denied certiorari.

3. THIS LITIGATION

In this case, petitioners urge that when the 1951 tax is assessed per wine gallon upon imported, below proof spirits, it is not "a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 1 of Article III in respect of the like domestic product * * *." Their argument is based on the assertion that domestic spirits produced in American bonded warehouses can be withdrawn from bond at more than 100 proof and later diluted, thus paying a lower tax per gallon of consumable spirits than is paid upon spirits which are imported in diluted condition.[1]

ARGUMENT

Petitioners are seeking to relitigate issues which were resolved adversely to the importers of distilled

[1] This ignores the rectification tax which domestic spirits must pay (Pet. 7, n. 8).

spirits in *Bercut-Vandervoort & Co.* v. *United States, supra.* The courts below were clearly correct in holding, in both *Bercut* and this case, that the provisions of the Internal Revenue Code relating to the taxation of distilled spirits do not conflict with the requirement of GATT that internal taxes be applied similarly to like products, whether imported or domestically produced. That holding, moreover, is consistent with prior decisions construing similar provisions in other international trade agreements.[2] Review by this Court is therefore not warranted.

The only distinction among distilled spirits which is drawn by Section 2800(a)(1) is based not upon the place of origin, but upon alcoholic content. Distilled spirits of less than 100 proof are taxed on a straight volume basis, while the tax upon distilled spirits of 100 proof or more is proportionately higher according to the alcoholic content of the spirits. GATT does not require that below proof imported spirits be taxed on the basis of alcoholic content merely because spirits of more than 100 proof are so taxed. The Agreement prohibits unequal taxation on "like" imported and domestic products. The distinction, inherent in internal revenue statutes for

[2] *United States* v. *Rathjen Bros.*, 31 C.C.P.A. (Customs) 70 (1943); *Vernon Distributing Co.* v. *United States*, 39 C.C.P.A. (Customs) 205 (1951). Contrary to petitioner's claim (Pet. 13), *Parrott & Co.* v. *United States*, 156 F. 2d 943 (C.A. 9), is not relevant. There the sole issue was *when* the tax attached to rum produced in the Virgin Islands: the Court held that the tax was to be imposed while the rum was in the Virgin Islands. Here, there is no suggestion that the tax might be imposed before the distilled spirits reach the United States.

almost a century, between below proof and over proof spirits serves to describe unlike products.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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